

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-496

Supreme Court, U. S.

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WILLIAM R. ROYCE, JR., CLERK

BENSON A. WOLMAN, *et al.*,

*Appellants,*

—v.—

MARTIN W. ESSEX, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

BRIEF FOR APPELLANTS

JOSHUA J. KANCELBAUM  
2121 The Illuminating Building  
Cleveland, Ohio 44113  
(216) 781-5245

NELSON G. KARL  
American Civil Liberties Union  
of Ohio Foundation, Inc.  
203 East Broad Street  
Columbus, Ohio 43215  
(614) 228-8951

DONALD M. ROBINER  
1700 Investment Plaza  
Cleveland, Ohio 44114  
(216) 696-4666

JOEL M. GORA  
American Civil Liberties Union  
22 East 40th Street  
New York, New York 10016  
(212) 725-1222

*Attorneys for Appellants*

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**BRIEF FOR APPELLANTS**

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**Citations to Opinions Below**

The opinion of the three-judge District Court for the Southern District of Ohio, Eastern Division, from which this appeal is directly taken, is reported as *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976) and is reproduced in the Appendix to the Jurisdictional Statement (hereinafter abbreviated "J. S. App.") at pp. A. 2-33.

**Statement of Jurisdiction**

Appellants, citizens and taxpayers of Ohio and the United States, filed their complaint in the District Court on November 18, 1975, alleging that a state statute, Ohio Revised

Code §3317.06,<sup>1</sup> violates the First and Fourteenth Amendments of the United States Constitution by effecting an establishment of religion. The complaint demanded preliminary and permanent injunctions against the enforcement of the statute, as well as other relief.

On December 22, 1975, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and determine the suit.

The judgment sought to be reviewed was entered by the three-judge district court below on July 21, 1976, upholding the constitutionality of the state statute and denying an injunction against its enforcement. Notice of appeal to this Court was filed in the District Court on August 10, 1976.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §§1253 and 2281, and standing is established under *Flast v. Cohen*, 392 U.S. 83 (1968).

### **Constitutional Provisions and Statutes Involved**

#### **United States Constitution**

##### **Amendment I:**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

##### **Amendment XIV, Section 1:**

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

<sup>1</sup> Hereinafter usually referred to as "SB 170."

### **Ohio Revised Code**

Section 3317.06 (usually referred to herein as SB 170) is appended to this Brief at pp. 1a-6a, *infra*.

### **Questions Presented**

1. Does a state statute which provides for the expenditure of public funds to furnish auxiliary materials and equipment for use within sectarian schools, including materials and equipment which cannot be loaned to such schools without violating the Establishment Clause of the First Amendment, satisfy the requirements of the Establishment Clause by authorizing the lending of such materials and equipment to the pupils and parents of pupils enrolled in such schools where such statute permits the materials and equipment to be stored on the sectarian premises and serviced there by public personnel, and where the materials and equipment so loaned include items which cannot practicably be distributed to individual pupils, but will be loaned to them as a group?

2. Does a state statute which provides for the expenditure of public funds to furnish diagnostic services, which include speech and hearing services and psychological services,<sup>2</sup> on the premises of private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

3. Does a state statute which provides for the expenditure of public funds to furnish therapeutic and remedial services, guidance and counseling and other programs, includ-

<sup>2</sup> As well as physician, nursing, dental, and optometric services which are not challenged in this suit.

ing services and programs which cannot be publicly provided on sectarian premises without violating the Establishment Clause of the First Amendment, satisfy the requirements of the Establishment Clause by authorizing the performance of such services by public personnel at locations off the sectarian premises which include mobile units parked nearby, and undefined public centers including centers used for such purposes only for the benefit of the sectarian beneficiaries of the services?

4. Does a state statute which provides for the expenditure of public funds to furnish standardized tests and scoring services for use in private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

5. Does a state statute which provides for the expenditure of public funds to furnish field trip transportation to classes attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

6. Does a state statute which provides for the expenditure of public funds to lend textbooks to pupils or parents of pupils attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

### Statement of the Case

#### A. History.

This action challenges the validity, under the Establishment Clause of the First Amendment, of SB 170 enacted by the General Assembly of Ohio and signed into law on

August 29, 1975. The substantive provisions of SB 170 are codified at Ohio Revised Code §3317.06.

Appellants filed their complaint in the United States District Court for the Southern District of Ohio on November 18, 1975, seeking a declaratory judgment and injunctive relief against the implementation of SB 170 on the grounds that its provisions effected impermissible aid to religious nonpublic schools, in violation of the Establishment Clause (Complaint, A. 4-14).

The defendants consisted of the Superintendent of Public Instruction, who is the chief executive and administrative officer of Ohio's Department of Education, and chief administrative officer of the State Board of Education; the State Board of Education as an entity; the Treasurer and the Auditor of Ohio; the Board of Education of the City School District of Columbus, Ohio; and the parents of several pupils enrolled in sectarian nonpublic schools (A. 6-8).

On motion of the plaintiffs, the District Court granted a temporary restraining order, on December 19, 1975, restraining the implementation of the Act. The restraining order was modified by consent order of February 13, 1976, to permit textbooks to be purchased from public funds and loaned to pupils of nonpublic schools or their parents to the extent such textbook loans had been held constitutional by this Court.<sup>3</sup>

The separate answers of the public and parental defendants filed December 9, 1975 and January 16, 1976, gen-

<sup>3</sup> *Meek v. Pittenger*, 421 U.S. 349, 362 (1975). The restraining order was dissolved when the court below entered judgment for defendants. Appendix (hereinafter "A.") 3.

erally denied the constitutional claims of the plaintiffs (A. 16-20, 21-24).

On December 22, 1975, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and determine the suit (A. 2).<sup>4</sup>

A comprehensive factual stipulation was agreed to by the parties and filed on March 16, 1976 (A. 25-71). On June 1, 1976, the three-judge court heard the case on the pleadings, the stipulation, and the briefs and arguments of counsel; and on July 21, 1976, the District Court announced its decision and opinion upholding the Establishment Clause validity of the Act<sup>5</sup> (A. 3).

On August 10, 1976, the plaintiffs filed their notice of appeal to this Court (A. 3). This Court noted probable jurisdiction on January 10, 1977.

#### **B. Summary of the Statutory Provisions.**

The provisions of the Act, which in its entirety is appended to this Brief (at pp. 1a-6a, *infra*), will be discussed in detail in the relevant portions of the Argument. In essence Section 3317.06 requires Ohio's school districts to use moneys paid to them from the state treasury<sup>6</sup> for the purposes set forth in Sections A through L of the statute.

<sup>4</sup> The initial designation, consisting of Hon. John W. Peek, Circuit Judge, and Hon. Carl B. Rubin and Joseph P. Kinneary, District Judges, was amended by order dated May 19, 1976, substituting Hon. Robert M. Duncan, District Judge, for Judge Rubin (A. 2).

<sup>5</sup> The opinion and order, being appended to the Jurisdictional Statement (J.S. App. pp. 1-33), are omitted from the Appendix.

<sup>6</sup> Pursuant to Section 3317.024 Ohio Rev. Code appended hereto at p. 9a, *infra*. Section 3317.024 is part of Ohio's Foundation program under which state funds supplement the essentially local funding of the school districts.

Section A requires the school districts "to purchase such secular textbooks as have been approved by the Superintendent of Public Instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. . . ."

Section B requires school districts "to purchase and to loan to pupils attending nonpublic school . . . or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program."

Section C is identical to Section B, except that it provides for the purchase and loan of instructional equipment instead of materials.

Section D calls for the provision of "speech and hearing diagnostic services to pupils attending nonpublic schools . . . . Such services shall be provided in the nonpublic school attended by the pupil receiving the service."

Section E provides for "physician, nursing, dental and optometric services" within the nonpublic schools.

Section F provides for "diagnostic psychological services" within the nonpublic schools.

Section G provides for "therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district." Unlike the diagnostic services these services are to be "provided in the public school, in public centers, or in mobile units located off of the non-

public premises as determined by the state department of education." Transportation to public schools or public centers at public expense is authorized.

Section H provides for "guidance and counseling services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in Section G.

Section I provides for "remedial services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in the two next preceding sections.

Section J requires the districts "to supply for use by pupils attending nonpublic schools . . . such standardized tests and scoring services as are in use in the public schools of the state."

Section K authorizes "programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district." These, like the other remedial and therapeutic programs, are to be furnished in public schools, public centers or mobile units.

Section L provides for field trip transportation.

Subsequent unlettered sections flesh out administrative and fiscal detail. Most pertinently:

"The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory of instructional materials and instructional equipment, distribution of instruc-

tional materials and instructional equipment to pupils or their parents, retrieval of such instructional materials and instructional equipment, and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their services upon the premises of the nonpublic school when in the determination of the state department of education, it is necessary and appropriate for efficient implementation of the lending program."

The remainder of the provisions of the Act limit benefits to those which are available to pupils attending the public schools within the district; require the furnishing of benefits, the admission of students and the hiring of faculty to be nondiscriminatory as to race, creed, color or national origin; prohibit the provision of services, materials or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity; and provide funding limitations. (See pp. 5a-6a, *infra*.<sup>7</sup>)

The State Department of Education is authorized to adopt guidelines and procedures for implementation of the Act (see p. 6a, *infra*), and has done so. The guidelines are appended to the stipulated record (A. 51-60, Ex. B).

<sup>7</sup> Allocation of funds is based on the State Board of Education's estimated annual average daily membership in the nonpublic schools located in the district (pp. 5a-6a, *infra*).

### C. The Stipulated Facts.

#### 1. Standing and Procedure.

The standing of the plaintiffs as citizens and taxpayers of the United States and the State of Ohio is stipulated (A. 26, S. 1),<sup>8</sup> as is the status of the public and nonpublic defendants (A. 26, S. 2, 3), and the due adoption of the statute and the guidelines (A. 26-27, S. 4, 5).

#### 2. The Appropriated Funding.

The initial appropriation to implement the nonpublic education benefits of the Act was \$88,800,000 for the 1975-76 biennium (A. 27, S. 6).

#### 3. Nonpublic Education in Ohio.

There were 720 chartered nonpublic schools in Ohio during the 1974-75 school year (A. 28-29, S. 10). Of these, 657 were Catholic (*Ibid.*) and all but 29 were sectarian (*Ibid.*). During this period more than 96% of the nonpublic enrollment attended sectarian schools and more than 92% attended Catholic schools (*Ibid.*).

It is stipulated that if called to testify, officials of the Catholic schools of the Diocese of Columbus, which are fairly representative of such schools throughout Ohio,<sup>9</sup> would testify that such schools are generally conducted in facilities owned or leased by the diocesan Bishop or a religious order (A. 30, S. 13 (a)-(b));<sup>10</sup> that most principals

<sup>8</sup> References to the stipulation indicate the page number of the appendix and the paragraph number of the stipulation.

<sup>9</sup> A. 30, S. 13 (a)-(b).

<sup>10</sup> The responsibilities of the bishop, the vicar episcopal for education and the pastor, *inter alia*, for the governance of the Catholic schools, are stated in the Diocesan Manual excerpted at A. 61-66. See A. 30, S. 13 (a).

are members of a religious order within the Church (A. 30, S. 13 (c)); that almost one-third of the teachers are priests, nuns, or other members of religious orders who have taken vows of obedience to the Church (A. 30-31, S. 13 (d)); that many of the classrooms, hallways and assembly areas of these schools are adorned with Christian symbols (*Id.* at e); that secular classes are taught in such rooms (*Ibid.*); that all teachers and administrators within the schools are employees of the schools (*Id.* at f); that religious exercises and practices are conducted during the school day (A. 31-32, S. 13 (g)); and that during religious classes pupils are taught sectarian views on topics of social concern such as marriage, divorce, family planning, sexual morality, abortion and sterilization (A. 32, S. 13 (i)). While it is stipulated that teachers of secular subjects include members of many different faiths and sects, in all probability the majority are Catholic (A. 33, S. 13 (j)).<sup>11</sup>

The Court below concluded that

“[a]lthough the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon v. Kurtzman*, 403 U.S. 602, 615-18 (1971)” (footnote omitted). *Wolman v. Essex*, 417 F. Supp. 1113, 1116 (S.D. Ohio 1976).

The record concerning the character of nonpublic education in Ohio has not materially changed from the record developed in previous litigation which has reached this Court concerning Ohio parochial assistance laws, and upon which this Court has found the Establishment Clause to

<sup>11</sup> This description of the stipulation is not intended to be exhaustive. See A. 28-33, S. 10-13.

have been violated. See *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1973) *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901 (1973); *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972) *aff'd* 409 U.S. 808 (1972).

Indeed, while the appellees did not concede that every aspect of the profile of sectarian schools described in this Court's opinion in *Meek v. Pittenger*, 421 U.S. 349, 356, 366 (1975), is factually applicable to Ohio's parochial schools, they have not argued that this Court's decisions on sectarian elementary and secondary schools in other states are in any way inapplicable in Ohio.

#### **D. Implementation of the Act**

The general mechanical operation of the statute is described in the Stipulation (A. 33-35, S. 14-16). Most significantly, the Act is administered locally through more than 620 public school districts throughout Ohio (A. 34-35, S. 15). The local districts approve services or materials requested by nonpublic school representatives after consultation with one of thirty-three Department of Education coordinators (*Ibid.*).

The methods of implementing the various specific programs as of the development of the record below are described in the Stipulation (A. 35-49, S. 17-38). In view of their prolixity these stipulated facts will be discussed in the portions of the Argument to which they pertain.

Finally, it is stipulated that because the "new law has not been implemented . . . the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances." (A. 49, S. 39).

#### **E. The Holding Below**

The District Court ruled, in essence, that the textbook loan provisions were indistinguishable from those upheld by previous decisions of this Court (417 F. Supp. at 1117); that the lending of instructional materials and equipment was not substantively different from the lending of textbooks (*Id.* at 1119); that the challenged diagnostic services were constitutional because they were health services involving limited pupil contact (*Id.* at 1121); that the removal of therapeutic services from parochial school premises cured First Amendment difficulties (*Id.* at 1123); that the testing and scoring services were valid by reason of standardization (*Id.* at 1124); and that field trip transportation was not different from the busing between home and school previously approved by this Court (*Id.* at 1124-1125). It therefore upheld the enactment.

#### **Summary of Argument**

1. The provisions of Sections B and C of the Act, which authorize the lending of instructional equipment and materials to pupils attending nonpublic schools or their parents, and which permit the equipment and materials to be stored on parochial school premises and serviced by public personnel, are not significantly different from the provisions of the Pennsylvania and Michigan laws, invalidated in *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (N.J. Dist. 1973), *aff'd* 417 U.S. 961 (1974), under which similar equipment and materials were loaned. There are only two notable differences between the statutory schemes. First, Ohio's law contains an express prohibi-

tion against lending items capable of diversion to religious use, whereas the Pennsylvania and Michigan laws had no such clause; but the ruling of the district court in *Meek v. Pittenger*, *supra*. Second, Ohio's law provides for the loan to pupils and parents rather than schools. However, given the nature of the items loaned and the surrounding circumstances the pupil-loan concept is a mere sham, and the pupils and parents must be regarded as a conduit to the school. Moreover, because the lending of equipment and materials under SB 170 is not limited to items which can be loaned to individual children, the analogy to textbook loans approved by this Court is inapropos.

2. The diagnostic psychological and speech and hearing services authorized to be conducted on parochial school premises under Sections D and F of the Act are subject to the same infirmity as the similar remedial and counseling programs stricken down in *Meek and Marburger*. The fact that these programs are "diagnostic" may slightly lessen, but does not eliminate, the need for impermissible public surveillance. Because of the amount of communication which these services would engender between the public personnel and the pupils, they are more like remedial and counseling services than like medical, nursing or similar non-educational health services which appear to be permitted under the Establishment Clause, and which have not been challenged in this suit.

3. The remedial and therapeutic services authorized by Sections G, H, I and K of the Act include services such

as remedial reading, guidance counseling and programs for the disturbed, which could not be performed on parochial school premises under *Meek* and *Marburger*. The Act requires them to be furnished off the nonpublic premises in three types of locations: public schools, public centers and mobile units parked near the parochial school. Insofar as the services are to be performed in public schools as part of a general program for public and nonpublic pupils, these provisions are not facially challenged. However, insofar as the Act merely moves the programs from within the school to the curbside or a public annex to a religious institution, it does not erase the potential for sectarian influence condemned in previous decisions. And to the extent the Act permits public facilities to be used for special purposes for parochial school pupils, as distinct from the general community, it improperly confers a special benefit on a sectarian class.

4. Section J of the Act, which requires the school districts to supply standardized tests and scoring services for use in parochial schools, is invalid upon the grounds set forth in *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). Although, unlike the teacher-prepared tests involved in *Levitt*, these tests are standardized, they remain "an integral part of the teaching process"; they are not loaned to individual pupils; and they are not neutral health services. Therefore, they cannot be furnished at public expense.

5. The field-trip transportation authorized by Section L of the Act is materially different from the busing approved in *Everson v. Board of Education*, 330 U.S. 1 (1974). It is stipulated that purpose of the field trip

transportation is "to enrich the secular studies of students." Moreover, the potential scheduling conflicts among schools desiring to use transportation facilities provides much greater potential for entanglement than does commuter busing between school and home.

6. The textbook loan provisions of Section A of the Act are broader than those approved in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Meek v. Pittenger*, *supra*. Section A permits the lending of "book substitutes" which could include auxiliary materials prohibited in *Meek* and *Marburger*. The stipulated contrary present intention of state education officials is an inadequate safeguard to prevent this result. Moreover, insofar as *Board of Education v. Allen*, *supra*, and *Meek v. Pittenger*, *supra*, permit such textbook loans, these decisions should be overruled as inconsistent with Establishment Clause strictures.

7. The massive and increasing Aid provided by SB 170 (now more than \$88 million), fosters excessive political divisiveness as condemned by recent decisions of this Court.

## ARGUMENT

### Introduction—The General Scheme of SB 170 Compared With Previously Adjudicated Auxiliary Services and Materials Programs.

On May 19, 1975 this Court announced its opinion striking down Pennsylvania's statutory program for the furnishing of auxiliary services and instructional materials to non-public schools. *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Meek* this Court noted that its earlier affirmance of a district court decision invalidating a similar Michigan law<sup>12</sup> was entitled to "precedential weight." 421 U.S. at 370 n. 20.

At the time of this Court's holding in *Meek*, the appellants' challenge to former Ohio Revised Code §3317.062, then in effect, which provided programs similar to those considered in *Meek* and *Marburger*, was pending on appeal to this Court. On May 27, 1975, this Court vacated the District Court's judgment which had upheld §3317.062<sup>13</sup> and remanded the cause for further consideration in the light of *Meek v. Pittenger*, *supra*. *Wolman v. Essex*, 421 U.S. 932 (1975). On remand, on November 17, 1975, the District Court entered a consent order in which it expressly found that there were no constitutionally significant differences between the provisions of the Pennsylvania legislation invalidated in *Meek* and those contained in the former Ohio Act, and declared that it violated the Establishment Clause of the First Amendment.<sup>14</sup>

<sup>12</sup> *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 20 (N.J. Dist. 1973), *aff'd* 417 U.S. 961 (1974).

<sup>13</sup> *Wolman v. Essex*, *supra*, S.D. Ohio No. 73-292 (July 1, 1974).

<sup>14</sup> *Ibid.* The consent order was entered November 17, 1975.

S.B. 170, challenged in this action, *inter alia*, repealed the doomed provisions of former Section 3317.062 and replaced them with the revised and expanded provisions of Ohio Revised Code Section 3317.06.

The issues presented in this case are put into perspective by a brief delineation of the fundamental differences between the former law invalidated by *Meek v. Pittenger* and the new law. As the ensuing paragraphs will document: first, the instructional materials and equipment which were formerly furnished to the nonpublic schools are now ostensibly loaned to the pupils or their parents. Second, the services are broadly dichotomized into diagnostic and remedial or therapeutic services. Diagnostic services are furnished within the nonpublic schools and remedial or therapeutic services are furnished in public schools, public centers or mobile units stationed off the nonpublic property. Provisions for textbook loans and specific health services including physician, nursing, dental and optometric services, which were not expressly authorized under the former law, have been added; while other services, including speech and hearing, psychological, guidance counseling, remedial services and programs for the handicapped, which had close counterparts in the former law, are carried into the new law. In some instances these have been divided into diagnostic and therapeutic components as described above. Compare, former Ohio Revised Code §3317.062 (*infra* at pp. 7a-8a), and Ohio Revised Code §3317.06 (*infra* at pp. 1a-6a).

Appellants contend that except insofar as certain specific neutral health services are offered (including the "physician, nursing, dental and optometric services" authorized

by Section E), the Act is based upon differences from the programs stricken down in *Meek* and *Marburger* which are constitutionally insignificant.

## I.

### **The Instructional Materials and Equipment Loan Provisions of SB 170 Violate the Establishment Clause.**

This appeal challenges the Establishment Clause validity of Ohio's latest legislative effort to channel massive aid to the parochial schools within its borders, all previous efforts (except for busing) having been declared invalid. *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972), aff'd 409 U.S. 808 (1972) (tuition reimbursements); *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1973), aff'd *sub nom. Grit v. Wolman*, 413 U.S. 901 (1973) (tax credits); *Wolman v. Essex*, U.S. Dist. Ct. S.D. Ohio No. 73-292 (July 1 1974), vacated and remanded 421 U.S. 982 (1975) (auxiliary services and materials).<sup>15</sup>

Recent decisions of this Court have repeatedly measured state laws challenged under the First Amendment's injunction against laws "respecting an establishment of religion"<sup>16</sup> against a three-part test.

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be

<sup>15</sup> Ohio's earlier salary-supplement law was repealed and replaced by a tuition reimbursement program in the wake of the holding of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) holding such programs unconstitutional.

<sup>16</sup> Made applicable to the states by the Fourteenth Amendment. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970); see also *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 (1973).

The most recent application of this three-part test to a statutory scheme of assistance to parochial grade schools involved programs which closely resemble Ohio's programs challenged here. In *Meek v. Pittenger*, 421 U.S. 349 (1975), this Court invalidated Pennsylvania's statutory program for furnishing instructional materials and equipment. *Id.* at 366. The Pennsylvania law defined instructional equipment and materials in such a way as to include substantially the same equipment and materials which can be furnished as auxiliary materials and equipment under S.B. 170. The definition of "equipment" in the Pennsylvania act included

"projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment . . ." 421 U.S. at 354 n. 4.

The definition of "materials" included:

"books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kine-scopes and video tapes, or any other printed and published materials of a similar nature. . . . The term includes such other secular, neutral, non-ideological

materials as are of benefit to the instruction of non-public school children and are presently or hereafter provided for public school children of the Commonwealth." *Ibid.*

Exhibit D of the Stipulation (A. 67-71, S. 21) is a list of materials and equipment available under SB 170. This exhibit consists of a compilation of the equipment and materials which were actually furnished in selected school districts under the invalidated predecessor statute. It is stipulated that

"[i]t is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied." <sup>17</sup> *Ibid.*

Exhibit D discloses that virtually all the items available under the Pennsylvania instructional equipment and material provisions invalidated in *Meek* are available under Sections B and C of SB 170.

The only noteworthy differences between Sections B and C of Ohio's law and the invalid provisions considered in *Meek* are that (i) Ohio's enactment expressly provides that only materials and equipment which are "incapable of diversion to religious use" may be furnished; and (ii) the materials and equipment are ostensibly "loaned" to the pupils or their parents, rather than loaned to the non-

<sup>17</sup> This section of the stipulations further recites that "[p]laintiffs reserve the right to argue that the two stated differences are not significant and that the restriction against supplying materials and equipment incapable of religious diversion cannot in fact be implemented." A. 36, S. 21.

public school. For the reasons stated in the ensuing paragraphs, neither of these differences is material to the validity of the Act under the Establishment Clause, and *Meek v. Pittenger* and other decisions of this Court require invalidation of SB 170.

**A. *Meek v. Pittenger* held that equipment and material loans aid religious activity.**

In *Meek*, this Court noted that “[a]lthough textbooks are lent only to students, [the Pennsylvania law] . . . authorizes the loan of instructional material and equipment directly to qualifying nonpublic . . . schools. . . .” 421 U.S. at 362-63. This Court rejected the attempted justification of these programs as benefiting only the secular portion of the nonpublic curriculum.

“[T]he massive aid provided the church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect nor incidental.” *Id.* at 365.

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“ . . . To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are ‘self-police[ing], in that starting as secular, nonideological and neutral, they will not change in use.’ [*Meek v. Pittenger*] 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania’s church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even

though earmarked for secular purposes, ‘when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,’ state aid has the impermissible primary effect of advancing religion. *Hunt v. McNair*, 413 U.S. 734, . . .” *Id.* at 365-66. (Emphasis added.)

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“The church-related elementary and secondary schools that are the primary beneficiaries of Act 195’s instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman*, 403 U.S., at 616-617. *Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.* ‘[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools’ existence. Within the institution, the two are inextricably intertwined.’ *Id.*, at 657 (opinion of Brennan, J.). See generally Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1688-1689. For this reason, Act 195’s direct aid to Pennsylvania’s predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial ad-

vancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S., at 781-783, n. 39, and thus constitutes an impermissible establishment of religion." *Id.* at 365-66. (Emphasis added; footnote deleted.)

This Court observed that its holding, as quoted above, was "directly supported, if not compelled" by its affirmance of *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974), holding New Jersey's similar programs to be unconstitutional.

Because "the direct loan of instructional material and equipment to church-related schools has the impermissible effect of advancing religion" (421 U.S. at 364 n. 13), this Court concluded that "there is no need to consider whether such aid would result in excessive entanglement of the Commonwealth with religion through 'comprehensive, discriminating, and continuing state surveillance.'" *Ibid.* However, it noted that the district courts below in *Meek* and in *Marburger* had held that "excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses"; and that the "affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." 421 U.S. at 366 n. 16.

Unless some distinguishing feature were to appear constitutionally significant, it must be concluded that *Meek v. Pittenger*, as well as the affirmance of *Marburger*, requires the overturning of the instructional materials and equipment sections of Ohio's latest enactment.

**B. The bare statutory restriction to materials and equipment incapable of diversion to religious use is insignificant and was effectively rejected in *Meek v. Pittenger*.**

While Ohio's SB 170 expressly contains a restriction against furnishing materials and equipment readily capable of diversion to religious use in the body of the Act, whereas the Pennsylvania law did not, the efficacy of such a restriction to save the measure from First Amendment challenge was explicitly rejected in *Meek v. Pittenger*. The district court in *Meek*<sup>18</sup> had held the furnishing of instructional materials and equipment to be constitutionally acceptable except to the extent that the statute authorized the loan of equipment "which from its nature can be diverted to religious purposes" (421 U.S. at 357), which the district court considered to include such items as "projection and recording equipment." *Ibid.*

Thus, when *Meek* reached this Court, only the supplying of instructional equipment and materials ostensibly incapable of religious diversion was at issue. This Court so noted at 421 U.S. 357 n. 7. In reversing the portion of the decision below which had upheld the furnishing of equipment apparently incapable of diversion, this Court ruled against the lending of such items as maps, charts and laboratory equipment as well as projectors and tape recorders. Given the lower court's holding in *Meek*, the Pennsylvania materials and equipment loan provisions were decisionally limited in precisely the same manner in which the Ohio Act is limited by its language. Therefore, the statutory restriction requiring that loans be limited

<sup>18</sup> The district court in the previous Ohio litigation ruled to the same effect. See *Wolman v. Essex*, U.S. Dist. Ct. N.D. Ohio No. 73-292 (July 1, 1974), vacated and remanded 421 U.S. 982 (1975).

to materials and equipment incapable of diversion adds no new element to distinguish this case from *Meek* or *Marburger*.

**C. *The fact that the materials and equipment are to be ostensibly loaned to pupils or parents is a constitutionally insignificant sham.***

The District Court below found that the distinction between lending materials and equipment to parochial schools and lending them to the student body was constitutionally decisive and approved this portion of SB 170 on that basis. 417 F. Supp. at 1118-19. However, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), this Court noted that:

"[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . . In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780.

"By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools . . . The effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Ibid.*

While SB 170 purports to limit the aid to so-called secular, neutral and nonideological materials and equipment, the

teaching of *Meek v. Pittenger* is that the effort to limit aid to the secular portion of the school's program is illusory in view of the "pervasive" and "inextricably intertwined" character of the religious involvement of the parochial schools. 421 U.S. at 366; and see *Hunt v. McNair*, 413 U.S. 734, 743 (1973).<sup>19</sup> For this reason the legislative feint of lending to students and parents does not alter the result decreed in *Meek*.

Similarly, in *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio E.D. 1972), *aff'd* 409 U.S. 808 (1972), this Court affirmed the district court's conclusion that tuition reimbursements to parents of parochial school pupils stood on no different footing than the teachers' salary supplements or arrangements for the purchase of secular education services from parochial schools previously condemned in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In refusing to accept the First Amendment efficacy of aid by indirection, the district court had said:

"it is true that a parental reimbursement program providing for transportation expenses was upheld in *Everson*; and that a similar scheme providing textbooks was allowed in *Allen*. These cases do not, however, establish that a 'conduit' device may be used as a means of avoiding the First Amendment. *Everson* and *Allen* were not upheld merely because they provided reimbursement aid to parents and students, but because the aid provided was ideologically neutral

<sup>19</sup> It is this pervasive sectarianism, as well as the greater vulnerability of grade school pupils to indoctrination, which distinguishes cases such as this from cases approving aid to the separate secular functions of sect-sponsored colleges and universities. See *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Board of Public Works*, — U.S. —, 96 S. Ct. 2337 (1976).

and supplied in common to the entire class of students of public and parochial schools alike." 342 F. Supp. at 415.

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"We conclude that it is of no constitutional significance that state aid goes indirectly to denominational schools . . . through the medium of parental grants. Since the potential ultimate effect of the scheme is to aid religious enterprises, the Establishment Clause forbids its implementation regardless of the form adopted in the statute for achieving that purpose." *Id.* at 417. See also *Sloan v. Lemon*, 413 U.S. 825 (1973).<sup>20</sup>

The lending of instructional equipment and materials is not practically analogous to the lending of textbooks approved in *Board of Education v. Allen*, *supra*, and *Meek v. Pittenger*. This is true not only by virtue of the reasoning presented in the preceding paragraphs but also because of the practical differences between books and materials and equipment—differences which are accentuated by provisions for storage and servicing of the equipment and materials—which reduce the pupil loan concept to fiction. Under the statute, as it is worded and as it will be implemented, there is no difference between a loan to the pupils or parents and a loan to the school.

First, the materials and equipment to be loaned are not limited to items which can be practicably distributed to

<sup>20</sup> The tax credit schemes which also sought to aid the nonpublic schools via parents were stricken down on the same basis in *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1973), *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901 (1973); and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

individual pupils, such as textbooks. Under the Stipulation (A. 67-71, S. 21 and Ex. D), the pupils can collectively borrow laboratories, maps and globes, posters, gymnastic equipment, encyclopedias, sewing machines and a host of other group-use items.

Second, the statute expressly authorizes the storage of the materials and equipment on the nonpublic school premises. While the lending is to be initiated by "individual request" it is naive to believe that what is requested will not be exclusively determined by the requirements of the nonpublic school administration and faculty.

The net result is that while the pupils or their parents may be the technical bailees of the loaned equipment and materials, these items will be deployed in exactly the same manner as under the prior law under which they were loaned to the schools.<sup>21</sup>

The court below concluded that it was necessary to uphold the First Amendment validity of the provisions for equipment and materials loans because, like the textbook loans upheld in *Meek* and *Allen*, these items were to be loaned "not to the nonpublic schools, but only to nonpublic school children or to their parents." 417 F. Supp. at 1118. The child benefit theory upon which the textbook loan programs were approved requires no such simplistic result.

<sup>21</sup> The Act further authorizes (and it is stipulated that the authority will be exercised, see A. 36, 54-55, S. 22) public personnel, working within the parochial schools, to distribute loan request forms, receive and catalog the requests, maintain inventories, distribute the material and equipment, collect the equipment, maintain custody and storage of the material and equipment, and perform all other duties necessary for the efficient implementation of the program. These provisions alone should suffice to invalidate the programs for excessive entanglement. See *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1973).

This Court has only upheld laws which purport to benefit the child, rather than the religious school, where it has found that the "financial benefit of [the] . . . program is to parents and children, not to the nonpublic schools." *Meek v. Pittenger*, 421 U.S. 349, 360 (1975). The bus rides approved in *Everson v. Board of Education*, 330 U.S. 1 (1947) and the textbooks permitted under *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Meek, supra*, were items customarily purchased by the parents. *Meek, supra*, 421 U.S. at 361 n. 10; *Everson, supra*, 330 U.S. at 19-20 (Justice Jackson, dissenting).

Moreover, the busing and textbook programs could in some meaningful way be regarded as conferring a personal benefit upon the child, distinct from the benefit to his class or school as a whole. The child rides the bus; the child carries and reads his textbooks. This Court made special note, in *Board of Education v. Allen, supra*, that "the books are furnished for the use of individual students. . . ." 392 U.S. at 244 n. 6 (emphasis added). The finding of constitutionality, in *Allen*, rested upon this consideration. *Ibid.* See Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1681 (1969).<sup>22</sup>

This Court has resisted any reductio-ad-absurdum extension of the child-benefit principle which would hold that the state can fund education in church schools because edu-

<sup>22</sup> In *Meek*, as in *Allen* before it, the textbooks were "to be lent directly to the student. . . ." *Meek v. Pittenger*, 421 U.S. at 361 (1975) (emphasis added). Mr. Justice Black, dissenting in *Board of Education v. Allen*, 392 U.S. 236, warned that "[i]t requires no prophet to foresee" that the rationale of *Allen* could be used to support subsidization of total religious education. *Id.* at 253. This Court acknowledged the "wisdom of Mr. Justice Black's prophecy" in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 785 (1973).

cation is a benefit to children. The customary recitals of legislative purpose in most, if not all, of the parochial assistance programs recently brought to this Court (and, no doubt, the arguments of their proponents) have emphasized the purpose of benefiting children. However, the answer furnished by this Court, most recently recapitulated in *Roemer v. Board of Public Works of Maryland*, 96 S. Ct. 2337 (1976), is that the "State may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike." *Id.* at 2345.

As this Court observed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in demarking the boundaries of church-state separation, it was not about "to engage in a legalistic minuet in which precise rules and forms govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance." *Id.* at 614.

The textbook and auxiliary equipment and materials holdings of this Court can be reconciled by a common sense approach to the child benefit theory. It is one thing to view the primary benefit of books furnished to individual children as aid to those individual children, and to regard the benefit to the school as incidental. It is quite another to suggest that wall maps, science labs, globes and the like, which are used by the pupils as a group and which would ordinarily be regarded as classroom equipment and supplies, where loaned under ostensibly similar terms, must receive the same First Amendment treatment. To the contrary, since there is no practical difference between the lending of such

items to the school, which this Court has forbidden to the states, and the lending of such materials to the pupils in care of the school under the scheme of SB 170, the equipment and material loan sections of SB 170 must similarly fall. Such loans are different from the earlier forms of this aid in name only. They constitute direct and primary aid to the schools no less than the benefits under their predecessor programs.<sup>23</sup>

## II.

### **Psychological and Speech and Hearing Diagnostic Services Provided by SB 170 Violate the Establishment Clause.**

Sections D, E, and F of the Act provide for various services to be furnished by public personnel "in the [nonpublic] school attended by the pupil receiving the service." Plaintiffs have conceded the facial constitutionality of the "physician, nursing, dental, and optometric services" authorized by Section E, but the "diagnostic psychological services" provided under Section F, and the "speech and hearing diagnostic services" provided under Section D, are wide of the narrow channel<sup>24</sup> through which public aid can flow to sectarian schools.

<sup>23</sup> While conceivably a few items of equipment might be analogous to textbooks, *i.e.* workbooks or outlines, the law is not limited to these items and the state has obviously taken no steps to "ensure" that proper "restrictions are obeyed" because it has imposed no such restrictions. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). The "potential for impermissible fostering of religion" is thus present. *Ibid.*

<sup>24</sup> See *Committee for Public Education v. Nyquist*, 413 U.S. 756, 777 (1973).

This Court has said that "public health services" have not been "thought to offend the Establishment Clause." *Lemon v. Kurtzman*, 403 U.S. 602, 616-617 (1971). However, the fact that a statutory program of assistance to sectarian institutions has a purpose or effect of promoting health or safety, has not served to sustain it where the program has otherwise had the impermissible effect of aiding religion or excessive entanglement. Thus, for example, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), state grants to maintain and repair nonpublic school buildings so as to "ensure the health, welfare and safety of enrolled pupils" (*Id.* at 763) were ruled invalid. *Id.* at 780. Public psychological and speech and hearing services, though "diagnostic", must also be excluded from sectarian schools.

The Pennsylvania law considered in *Meek v. Pittenger*, *supra*, called for "auxiliary services" to be performed by public employees on parochial school premises. The services included remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services. 421 U.S. at 367. The Pennsylvania public institutions, like those of Ohio (A. 38-39, S. 27), provided no inspection or supervision to establish that the law's secular limits were being observed, because it was felt that such surveillance was unnecessary to assure that a member of the staff had not "succumb[ed] to sectarianization of his or her professional work." 421 U.S. at 368, quoting from the district court opinion, 374 F. Supp. at 657. This Court disagreed.

"... [D]ecisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and coun-

selors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 369.

This Court so ruled in *Meek* on authority of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which it had held that where there is a "potential for impermissible fostering of religion . . . [t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . ." *Id.* at 619. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected . . . ." *Ibid.*

Regarding the auxiliary character of the services to be performed by the publicly subsidized teachers in *Meek*, the Court noted:

"That Act 194 authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Earley v. DiCenso* and *Lemon v. Kurtzman*, *supra*. Whether the subject is 'remedial reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.' 403 U.S., at 619. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher

to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.

"The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related school in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary services personnel, because not employed by the non-public schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon v. Kurtzman*, 403 U.S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *id.*, at 618-619. . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." (Emphasis added; footnote deleted) 421 U.S. at 370-72; see also *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (N.J. Dist. 1973), *aff'd* 417 U.S. 961 (1974).

The foregoing portion of the *Meek* opinion establishes that the First Amendment strictures against public funding of services to be performed by public employees on parochial premises extend to "counselors" and "remedial"

personnel as well as to teachers. In tacit recognition of this principle, the framers of SB 170 removed the more patently remedial and therapeutic services from the parochial premises to the curbside. And while presumably the most narrowly physical health services such as physician, nursing, dental and optometric are protected by the Supreme Court's dictum approving such services (see *Meek*, 421 U.S. at 371 n. 21), no such protection can be extended to psychological and speech and hearing services.

#### **Psychological diagnostic services**

The functions of diagnostic psychological personnel include, in addition to aptitude testing, "individual measures to determine social and behavioral adaptability . . . interviewing and . . . projective procedures." A. 39, S. 28 (b). On the face of this description, these functions include a degree of intercommunication between the diagnostician and the pupil, and an intrusion into the social and behavioral aspects of the pupil's personality, which provides at least as great an opportunity for religious influence as does the guidance counseling, testing, and remedial instruction prohibited in the parochial schools by *Meek* and *Marburger*, *supra*, and by *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). By virtue of their mutual concerns with human behavior and consciousness, there is a close relationship between aspects of psychology, psychiatry and religion. See, for example, *Thomas S. Szasz, M. D., The Manufacture of Madness* (Harper & Row 1970);<sup>25</sup> see also, *Carl G. Jung, Psychology and Re-*

<sup>25</sup> Dr. Szasz expounds the view that institutional psychiatry is an extension of earlier sanctions for heresy as a control for forms of deviation the stigmatization of which is essentially clerical in origin. See particularly *The Manufacture of Madness*, *supra*, ch. 10 "The Product Conversion—from Heresy to Illness."

*ligion* (Yale Univ. Press 1938). Nor is it always possible to separate neatly psychological diagnosis from theory. See *Coleman, Abnormal Psychology and Modern Life*, p. 526-527 (2d ed., Scott, Foresman 1956).

The conclusion is compelled that it is excessively entangling for experts employed by the government to tinker with the attitudes and personality of a pupil in the setting of a religious institution. There is too great a danger, for example, that irreverent or heretical attitudes and beliefs will be interpreted as psychologically deviant or antisocial. It is difficult to imagine a situation more potentially destructive of the concept of separation of church and state than that which permits government psychologists to evaluate the mental processes of children in a church.

#### **Speech and hearing diagnostic services:**

In *Meek v. Pittenger* this Court observed, in dictum, that the Pennsylvania Act's "authorization of 'speech and hearing services', at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State. . . ." 421 U.S. at 371 n. 21.<sup>26</sup> Nevertheless appellants urge that Ohio's provision for speech and hearing diagnostic services is vulnerable to challenge on Establishment Clause grounds. The constitutional infirmity of Section D, of SB 170, which authorizes such services, lies in its vague and general wording. "Speech and hearing diagnostic services" are unlimited in character. Nor do

<sup>26</sup> These services were stricken down in *Meek* because they would have been left standing alone, and the Court could not "assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid." 421 U.S. at 371 n. 21.

the guidelines further define the services. A. 56, S. 5 and Ex. B. The stipulated record is that the function of the speech and hearing diagnostic therapist is to "identify children who have speech and hearing handicaps and to refer them to the speech and hearing therapist for treatment." A. 39, S. 28 (a) (i). The diagnostician is to cooperate with the physician and nurse in the development of a hearing testing program. A. 39, S. 28 (a) (ii). However, the diagnostician's services are not limited to employing any standardized or objective testing methods.

In drawing the line between general welfare provisions and impermissible remedial education measures prohibited by *Meek* and *Marburger* it would appear necessary to consider the opportunity for sectarian influence and abuse. See *Meek*, 421 U.S. at 371-72. Where the "potential for impermissible fostering of religion . . . although somewhat reduced, is nonetheless present," this Court has held that unconstitutional continuing surveillance would be necessary to enforce restrictions. *Meek v. Pittenger*, 421 U.S. 349, 372 (1975).

Unlike a physician or a nurse whose contact with the child is ordinarily limited to a physical appraisal and a minimal amount of oral communication concerning the child's physical condition, the speech and hearing staff can be expected to communicate with a pupil at length in order to assess the child's communicative abilities. Without inspection, controls, or even regulatory requirements concerning the methods of diagnosis, the danger that a speech and hearing diagnosis program could involve unrestricted conversation between therapist and pupil in which the therapist, like the "chemistry teacher" whose vulnerability was noted in *Meek* (*Id.* at 371), would "fail

on occasion to separate religious instruction and the advancement of religious beliefs from his secular . . . responsibilities" (*Ibid.*), cannot be ignored.

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The Court below, without reference to authority, upheld these diagnostic programs in the belief that they require "only relatively limited contact with the child" (417 F. Supp. at 1121) and that the notion that health services "must be conducted in silence . . . strikes this Court as beyond the reach of reason." *Ibid.* However, this Act does not guarantee that the contacts will be minimal, or that when the silence is broken, the utterances will be secular. Just as the State could not rely on the "good faith and professionalism of the secular teachers and counselors functioning in church related schools . . ." *Meek, supra*, 421 U.S. at 369, it is insufficient to rely on the good faith and professionalism of other personnel, at least when their duties are permitted to involve substantial communication with pupils.

The opportunity for sectarian content is present and the State has taken no steps to be "certain . . . that the subsidized" personnel "do not inculcate religion . . ." *Lemon v. Kurtzman*, 403 U.S. 602, 618-619 (1971). Therefore the diagnostic provisions of SB 170 must be declared invalid.

## III.

**Therapeutic Psychological and Speech and Hearing Services, Guidance and Counseling Services, Remedial Services and Services for the Handicapped Provided by SB 170 Violate the Establishment Clause Except to the Extent Furnished Within Public Schools.**

The therapeutic, counseling and remedial services encompassed by Sections G, H, I and K of the Act plainly extend far beyond the neutral health services approved by dictum in prior decisions of this Court.

The services authorized by these sections include "therapeutic psychological and speech and hearing services" (G), "guidance and counseling services" (H), "remedial services" (I) and "programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped. . . ." (K). The guidelines do not appreciably narrow the available services (A. 56-58, S. 5 and Ex. B).

The stipulation, however, makes it clear that therapeutic personnel are to have ample educational and counseling duties involving close and ongoing relationships with pupils.

For example, the functions of the school psychologist include parent and teacher conferences, report writing and planning, and "intervention strategies." A. 43-44, S. 36 (a). Similarly, guidance counselors, *inter alia*, lend assistance in developing self-understanding and developing educational and career goals. A. 45-47, S. 36 (c). The learning disability staff implements instructional plans (A. 47, S. 36 (d)), and the remedial services staff supple-

ments classroom instruction for children with problems and disabilities. A. 47-48, 36 (e).<sup>27</sup>

The authorized services are thus similar to those which, *Meek* and *Marburger* instruct, have too great a potential for religious infusion to be performed by public personnel within parochial schools. In *Meek*, "remedial and accelerated instruction" and "guidance counseling" were offered. 421 U.S. at 367. In *Marburger*, remedial and corrective instruction and guidance counseling, *inter alia*, were involved. 358 F. Supp. 29, 39 (N.J. Dist. 1973), *aff'd* 417 U.S. 961 (1974). Because this Court has held, in *Meek* and *Marburger*, that such programs cannot be conducted by state personnel in sectarian schools, the Establishment Clause propriety of the SB 170 programs must stand or fall on the constitutional effect of diverting them from within the school to a public school, or to a public center or mobile unit stationed off the nonpublic premises.

While the furnishing of governmentally subsidized services to pupils enrolled in a public school on the same basis as such services are provided for public school pupils in that school presents grave problems of excessive entanglement in the scheduling and integration of such services, it would appear that a statute authorizing parochial pupils to enter a public school and receive such services, as a part of a program offered to public school pupils as well, is

<sup>27</sup> The remedial services and services for the handicapped are not defined by the Act or the stipulation in any manner which limits the services to health programs. Indeed the record establishes that the programs are to be instructional. A. 47-48, S. 36 (d) and (e). However much one may sympathize with a handicapped child, it is no more proper to subsidize his education in a religious school than to subsidize such parochial education for a normal child.

not facially invalid.<sup>28</sup> Accordingly, plaintiffs do not challenge the provision for furnishing such services in the public schools.<sup>29</sup> However, the furnishing of such services in other public centers or in mobile units presents different First Amendment problems. Insofar as SB 170 permits these programs it fosters aid to religious activity.<sup>30</sup>

**A. The use of mobile units results in the perpetuation of the evils presented by on-premises auxiliary services.**

It is stipulated that where mobile units are employed they will "in all probability be stationed on public property close to the nonpublic school of attendance" (A. 42-43, S. 33); and that "[w]hile so stationed, the personnel in the unit will be providing services solely to nonpublic school pupils except in unusual circumstances. . . ." *Ibid.* In other words, a publicly purchased mobile home can be parked in a lot next to the parochial school, or at its curbside, and public personnel will operate it as an annex

<sup>28</sup> This Court declined to rule on the First Amendment consequence of the obverse situation where public school teachers would enter parochial schools to perform remedial services funded under Title I of the Federal Elementary and Secondary Education Act of 1965 (20 U.S.C. 241 (a) *et seq.*) in *Wheeler v. Barrera*, 412 U.S. 402 (1974). In view of the opinion in *Meek v. Pittenger*, such use of Title I funds may well be invalid. However, the dual enrollment programs noted as an alternative in *Wheeler* (417 U.S. at 409-410) have not yet been adjudicated by this Court.

<sup>29</sup> Plaintiffs reserve the right to attack the application of this portion of the statute if a different program is administered for parochial pupils within a public school, or if excessive entanglement appears.

<sup>30</sup> Since safeguards against advancement of religion are not provided, it is unnecessary to determine whether such safeguards would create excessive entanglement as found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

to the parochial school to provide services which could not be performed within the walls of the school itself. In fact, the services could even be provided on grounds presently devoted to sectarian use if a parking area is transferred from the church to the school district or other political subdivision. In other words, the only difference between these services performed in mobile units under SB 170, and the services unconstitutionally furnished under the former Ohio law or the Pennsylvania and Michigan laws previously stricken down, is the technical difference of title to the classroom.

As noted earlier (p. 31) this Court has cautioned that parochial aid schemes are not to be evaluated in "a legalistic minuet in which precise rules and forms must govern." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Rather, "the form of the relationship" must be examined "for the light it casts on the substance." *Ibid.*

The reason for this Court's conclusion that the Pennsylvania auxiliary services program constituted impermissible direct aid was not that the public lacked title to the real estate where the services were to be rendered, but that the public employees were performing services where "education is an integral part of dominant sectarian mission . . .," *Meek v. Pittenger*, 421 U.S. 349, 371 (1975), so that the "potential for impermissible fostering of religion . . . , although somewhat reduced, is nonetheless present." *Id.* at 372. It is difficult to discern why a special satellite facility for parochial pupils, parked outside the gate but devoted entirely to the nonpublic institution to which it is appended, should provide materially less opportunity for fostering of religion than the same unit inside the walls. It is true that religious artifacts may be absent

from the mobile unit's walls; but that is about the only discernible difference. If, for example, a guidance counselor performs his counseling in a mobile office parked at the gates of a sectarian institution, it would appear no less likely that the counselor will give deference to the sectarian attitudes of the institution on matters such as sexual morality, birth control, abortion, intermarriage and the like as if the counselor were within the walls of the institution.

Where auxiliary services are performed within a public school as part of a generally available program there would appear to be much less potential for pressure from the sectarian beneficiaries of the program for concessions along doctrinal lines than where the program is directed toward a particular sectarian constituency. Moreover, where the program is administered in a public school as part of its regular program it may be possible to regard the extension of the program to parochial pupils as a matter of making "available to all children the benefits of a general program." *Meek v. Pittenger*, 421 U.S. 349, 360 (1975) quoting from *Board of Education v. Allen*, 392 U.S. 236, 243-44 (1968).<sup>31</sup> On the other hand, where elaborate differences are built into the program as it is administered for parochial pupils, it must be regarded as a special program for a limited class of sectarian beneficiaries, and constitutionally suspect on that ground alone. See *Wolman v. Essex*, 342 F. Supp. 366, 412 (S.D. Ohio 1972), aff'd 409

<sup>31</sup> This position is consistent with the thesis of Freund, *Public Aid to Parochial School*, 82 Harv. L. Rev. 1680 (1969), in which the view is expressed that "[s]hared time instruction in the public schools, treating participating parochial school children as part-time public school children" (*Id.* at 1691) is the limit to which the policy of neutrality [toward religion] carries us." *Id.* at 1688.

S. Ct. 808 (1972); *Kosydar v. Wolman*, 353 F. Supp. 744, 752-53 (S.D. Ohio 1972), aff'd 93 S. Ct. 3062 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 783 n. 38.<sup>32</sup>

In *Nyquist*, this Court refused to analogize tuition grants, available only to the nonpublic class of beneficiaries, to textbooks and bus rides as an "endeavor to provide comparable benefits to parents of schoolchildren whether enrolled in public or nonpublic schools," 413 U.S. at 782. The same reasoning requires conclusion that the mobile units serve to benefit a sectarian group. The fact that comparable programs may be available in public schools does not cure this infirmity.

**B. The furnishing of services in public centers constitutes a special benefit to a sectarian class without essential guarantees against fostering religion or excessive entanglement.**

The third category of facility where therapeutic and remedial services may be furnished under SB 170 is "public centers." Neither the Act nor the guidelines specify the kinds of public centers which may be employed for such purposes, but the stipulation denotes the intention of the Ohio Department of Education that such facilities as "... a library, public meeting hall, firehouse, or recreation center ..." may be so employed. A. 42-43, S. 33. That stipulation also establishes that "[i]f a program is to be offered at a public center such as ... [those listed above], services may be available for public and nonpublic pupils at the same center." *Ibid.* (Emphasis added.) Since Ohio

<sup>32</sup> The district court in *Marburger* invalidated textbook purchase reimbursements for parents of parochial pupils on this basis. 358 F. Supp. 29, 36 (N.J. Dist. 1973) aff'd 417 U.S. 961 (1974).

law does not provide for such services to be rendered for public school students at facilities such as those listed above, it is highly speculative that such services will in fact be rendered to public school students at public centers. As indicated in the stipulation quoted above, the furnishing of such services at public centers to pupils across the board "may" occur, or optionally, the public centers may be exclusively devoted to assisting the sectarian community insofar as the services contemplated by the Act are concerned.

Plaintiffs have no quarrel with making public centers available to pupils enrolled in nonpublic schools *for the same purposes for which those facilities are available to the public*. For example, it would be unthinkable to deny some pupils access to libraries, museums, parks, zoos, and the like because they are enrolled in parochial schools. However, that is not the case when a special program is instituted in a public center for the special benefit of parochial pupils, and that program is either not available to public school pupils at that center, or is only made available to them in order to justify the assistance to the parochial constituency. In either case, the public benefit must be regarded as incidental, and the primary purpose and effect must be deemed to constitute assistance to a sectarian class of beneficiary.

Moreover, the Act does not identify the public centers at which the services are to be rendered, and the listing in the stipulation (A. 42-43, S. 33) is not recited to be exclusive. There is nothing in the Act to preclude a substantial portion of the massive appropriation from being expended on the capital cost of erecting centers which are public in the sense of belonging to the school district,

but which are brought into being solely to effectuate the provisions of the Act for the benefit of nonpublic school pupils. Appellees have urged that there is no official intention to do so (Motion of nonpublic appellees to Dismiss or Affirm, p. 14), but the Act does not restrict the funds against such use.

This Court has recognized that the three-part test applied in recent Establishment Clause cases—secularity of purpose, a primary effect that neither advances nor inhibits religion, and avoidance of excessive entanglement—is not exclusive.

"It is well to emphasize . . . that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975).

Even if religion *per se* were not advanced and excessive entanglement were avoided, the Establishment Clause would appear to be violated by the government's furnishing of even secular benefits to a distinctly sectarian class. For example, the furnishing of free toothbrushes—as well as free Bibles—only to Christians or only to Jews would be inconsistent with the Establishment Clause injunction against an officially preferred church. James Madison, in his Remonstrance, which is perhaps the seminal precursor of the religion clauses<sup>33</sup> hinted at this proposition when he suggested that the Virginia bill to support teachers of the Christian religion "violates equality by subjecting

<sup>33</sup> See *Everson v. Board of Education*, 330 U.S. 1, 12 (1947).

some to peculiar burdens; so it violates the same principle by granting to others peculiar exemptions."<sup>34</sup>

Moreover, even though the services may be provided at a nonsectarian site, under SB 170 they will be provided to an identifiable sectarian group. The same problems of sectarian influence as are created by the use of curbside mobile units are thus presented. See pp. 43-45, *supra*. While the publicly paid teachers, counselors and therapists may not be within the walls of church property, they will nevertheless be subject to pressures to tailor their approach to the sectarian requirements of the constituency in the name of good relations. A guidance counselor or psychologist may well be intimidated in his approach to a teenager's sexual or familial difficulties by the fact that the counseling is in the environment of a group possessed of a clear orthodox religious dogma on the subject. The state has taken no steps to assure that this religious infusion will not take place and that the "subsidized teachers do not inculcate religion. . . ." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Like the auxiliary personnel in *Meek v. Pittenger*, Ohio's remedial and counseling staff is engaged in "performing important educational services"<sup>35</sup> which, if not within the nonpublic schools, will nevertheless be directed to their sectarian student bodies. The "atmosphere" will remain "dedicated to the advancement of religious belief. . . ." *Meek v. Pittenger*, 421 U.S. 349, 371 (1975).<sup>36</sup>

<sup>34</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 4, reproduced at 330 U.S. 64, 66.

<sup>35</sup> *Meek*, *supra*, 421 U.S. at 371.

<sup>36</sup> The Court below noted that "according to the stipulations of the parties, it is anticipated that personnel providing therapeutic and remedial services will, under some circumstances, be required to deal with the child's regular classroom teachers." 417 F. Supp. at 1123.

Given the stipulated fact that distance and safety of travel will be factors in site selection for these services (A. 42, S. 32) clairvoyance is not required to foresee that public centers, like mobile units, will generally be located as close to the parochial schools as possible. To the extent that these services are not provided in facilities fully shared and integrated with the public school student bodies, they clearly threaten a proliferation of public annexes to church schools. Such a prospect cannot be squared with the commands of the Establishment Clause.<sup>37</sup>

#### IV.

#### Standardized Testing and Scoring Services Provided by SB 170 Violate the Establishment Clause.

In *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for expenses of examination and testing of pupils. The basis for the rejection of this program was not merely that it involved the payment of money to the nonpublic schools, but that testing is an "integral part of the teaching process." 413 U.S. at 481 quoting with approval from the holding of the district court, 342 F. Supp. at 444.

It is true that most of the testing involved in *Levitt* was teacher prepared, whereas the tests authorized by Section J of SB 170 are "standardized." However, the thrust of *Meek v. Pittenger* is that given the pervasive religious mission and character of the parochial school, "it would

<sup>37</sup> Transportation to and from public centers, authorized by these provisions of SB 170 also constitutes a special benefit to a sectarian class and should be invalidated on that basis.

simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed. . . ." *Id.* at 365.<sup>38</sup>

Testing, even when standardized, remains an "integral part of the teaching process," *Levitt, supra* (413 U.S. at 481). As such, testing is not a denominationally neutral health service; nor is it an item which can be "loaned" to individual children in the parochial and public schools like a textbook. It involves personnel of the state in scoring to "measure the progress of students" in their subjects at the parochial schools (A. 48, S. 37). Considering the factor of pervasive religious infusion found by the Supreme Court in *Meek*, that the subjects scored are nominally secular can make no difference. The predominantly sectarian teaching mission of the parochial school is a primary and direct beneficiary. The Establishment Clause is thereby violated.

<sup>38</sup> The subsequent New York scheme for reimbursing parochial schools for the cost of administering state-prepared examinations has thus been invalidated on authority of *Meek*. *Committee for Public Education v. Levitt*, 414 F. Supp. 1174, 45 L.W. 2021-22 S.D.N.Y. June 21, 1976). Appeal to this Court was filed October 19, 1976, has been assigned No. 76-595, and is pending.

## V.

### Field Trip Transportation Authorized by SB 170 Violates the Establishment Clause.

Bus transportation to and from parochial schools, approved in *Everson v. Board of Education*, 330 U.S. 1 (1947), was thought to approach "the verge." *Id.* at 16. See *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971). At most, the transportation approved in *Everson* involved getting the child to and from school at regular morning and afternoon times. That transportation did not involve assistance to any specific portion of the educational program of the parochial school; and the scheduling entanglements which it entailed, though certainly substantial, were relatively predictable and manageable. This Court noted, in *Everson*, that the services which it approved for parochial schools were "... separate and ... indisputably marked off from the religious function. . . ." 330 U.S. at 18. In view of the impossibility, for Establishment Clause purposes, of any "attempt to separate secular educational functions from the predominantly religious role" of these schools, *Meek v. Pittenger*, 421 U.S. 349, 365 (1975), busing which is an integral part of the education process, like testing, must constitute impermissible aid to the sectarian function of the institution.

Field trip transportation provided under Section L of the Act is stipulated to be for the purpose of facilitating trips "to enrich the secular studies of students." (A. 49, S. 38). As such it bears a direct relation to the educational program of the school, including its integrated religious program, which the state is not permitted to enhance. See *Meek, supra*, 413 U.S. at 366.

Moreover, the opportunities and necessity for excessive entanglement are greatly exacerbated in the case of field trip transportation. The busing needs for an *Everson*-type commuter program can be anticipated based on nonpublic enrollment for the school year, and presumably will not change drastically from day-to-day within a school year. On the other hand the extent of required field trip transportation depends not only upon enrollment, but also upon the unilateral determination of the nonpublic school administration as to the number and destination of field trips. Accordingly, it will be necessary for the public and nonpublic school administrations to cooperate in the allocation and scheduling of busing in connection with field trips. In the event of conflict, it can be anticipated that pressure from the sectarian community will be exerted to obtain concessions from the government operated schools. The prospect of administrative and political entanglement is therefore present.<sup>39</sup>

If the busing approved in *Everson* "was thought to approach the 'verge'" (*Lemon*, 403 U.S. at 624), the field trip transportation contemplated by SB 170 must be deemed to have stepped beyond the precipice.

<sup>39</sup> The Court below minimized the importance of the entanglement factor by referring to the Act's provision for contracting the transportation services. 417 F. Supp. at 1125. However, contracting merely changes the context of the entanglement, for if a nonpublic school can, in effect, cause the school district to hire a bus whenever it desires one, budgetary chaos would result. There will remain the necessity of coordination and competition for available busing funds.

## VI.

### The Textbook Loan Provisions of SB 170 Violate the Establishment Clause.

There are significant distinctions between the textbook loans provisions of Section A of SB 170 and those upheld by this Court against challenge under the religion clauses of the First Amendment in *Board of Education v. Allen*, 392 U.S. 236 (1968) and *Meek v. Pittenger*, *supra*. Most notably, the definition of "textbook" is broadened to include "any book or book substitute which a pupil uses as a text or text substitute. . . ." Given the position of the appellees<sup>40</sup> that there is no realistic difference between books and auxiliary equipment and materials, the concept of book substitutes may well come to be employed to permit the public furnishing of items which cannot be loaned under the doctrine of *Meek v. Pittenger*, *supra*.

While it is stipulated that if called to testify, Ohio Department of Education officials would aver<sup>41</sup> that "[t]extbooks, including book substitutes, provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form. . . ." (A. 35-36, S. 20) it is also stipulated that

"the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances." A. 49, S. 39.

<sup>40</sup> Sustained by the court below. 417 F. Supp. at 1119.

<sup>41</sup> A. 25, S. p. 1, introductory paragraph.

The mere intent of the Department of Education is not a sufficient safeguard against Establishment Clause abuse, and is not the equivalent of a statutory restriction which can be predicted to remain in effect unless amended by the legislature with all of the publicity inherent in the legislative process.

As has been noted in preceding sections of this brief (for example, pp. 33-35, *supra*) the decisions of this Court have required that the states "ensure" against sectarian abuse of parochial assistance programs. See *Meek v. Pittenger*, 421 U.S. 349, 372 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). SB 170 only ensures that the textbook loan clause will not be abused so long as the Superintendent of Public Instruction does not change his mind.

The Ohio book loan provisions can thus be held to constitute impermissible aid to religion without disturbing prior decisions of this Court. However, even if the Ohio provisions were identical to those involved in *Meek* and *Allen*, appellants respectfully urge that they should be stricken down, and that insofar as previous rulings of this Court have upheld such programs, those decisions should be overruled.

It is possible and appropriate to harmonize the textbook and auxiliary equipment facets of this Court's opinion in *Meek* without exalting form over substance along the lines suggested in Section I of this Argument (pp. 19-32, *supra*). Nevertheless, the dissenting opinions of Justices Black and Douglas in *Allen* (392 U.S. at 250 and 254) and the partial dissent of Justice Brennan in *Meek*, in which Justices Douglas and Marshall joined, have great force. For as Justice Douglas said, in *Allen*, "[t]he textbook goes to the very heart of education in a parochial school." 392 U.S. at 257.

And as Justice Brennan observed in *Meek*, it was "crystal clear that the nonpublic school and not its pupils . . . [was] the motivating force behind the textbook loan. . . ." 421 U.S. at 379-80.

This Court has not shrunk, where necessary, from overturning its previous decisions which have been out of line with the theme of intervening constitutional developments. Appellants urge this Court now to hold that textbook loans, like other forms of state aid to integral parts of the parochial teaching process<sup>42</sup> from which the "predominant religious role" cannot be extracted,<sup>43</sup> cannot be supplied in aid of sectarian institutions by the State.

## VII.

### The Programs Authorized by SB 170 Foster Excessive Political Entanglement.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) this Court took heed of the "broader base of entanglement"<sup>44</sup> engendered by the "devisive political potential"<sup>45</sup> of state parochial aid programs.

"The potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." *Id.* at 623.

<sup>42</sup> Cf. *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).

<sup>43</sup> See *Meek*, 421 U.S. 349, 365 (1975).

<sup>44</sup> 403 U.S. at 622.

<sup>45</sup> *Ibid.*

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), it was suggested that although

"the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored." *Id.* at 798-99, quoting from *Lemon v. Kurtzman*, *supra*, 403 U.S. at 625.

Most recently, in *Meek v. Pittenger*, this Court has reaffirmed the importance of considerations of political entanglement. "The Act . . . provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect. . . ." 421 U.S. at 372.

The political entanglement fostered by Ohio's latest enactment is particularly pernicious. In the first place, the amount of the appropriation is enormous. The eighty-eight million dollars appropriated for the current biennium (A. 27, S. 6) is substantially larger than the Pennsylvania appropriation in *Meek* which this Court characterized as "massive." 421 U.S. at 365.<sup>46</sup> Based upon an Ohio non-public enrollment of 262,628 (A. 28, S. 10), the average annual expenditure per pupil exceeds \$167, as contrasted with the grants of \$75 to \$150 involved in *Sloan v. Lemon*, 413 U.S. 825, 831 (1973), or the "modest" grants of \$50 to \$100 considered in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 797 (1973). The "self-expanding

<sup>46</sup> In *Meek*, the 1973-74 appropriation under Act 195 (equipment, materials and textbooks) was \$17,560,000 and the appropriation for services for that year was \$17,880,000. 421 U.S. at 365 n. 15; *id.* at 369 n. 19. The annual appropriation in Ohio exceeds \$44,000,000.

propensities" of these laws, noted in *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971), are strikingly demonstrated when the SB 170 appropriation is compared to the mere \$5,000,000 expended per year under the Pennsylvania program invalidated in that case. *Id.* at 610.<sup>47</sup>

Auxiliary materials, equipment and services for the parochial schools are thus supplied at an annual cost which is greater than that which was deemed appropriate, only a few years ago, for public aid to the core of the secular education programs of the parochial schools.

This "potential for political entanglement"<sup>48</sup> infects all but the most neutral, health-oriented programs countenanced by the Act. When considered together with the Act's primary effect of advancing religion, and the necessity for surveillance to prevent excessive entanglement under its programs, this political entanglement requires that SB 170 be ruled invalid.

<sup>47</sup> In Ohio, aid to parochial schools was funded at only about \$30,000,000 per year under the tuition reimbursement program stricken down in *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1974), *aff'd* 409 U.S. 808 (1972).

<sup>48</sup> *Meek v. Pittenger*, 421 U.S. 349, 372 (1975).

### CONCLUSION

SB 170 is an elaborate effort to evade the commands of *Meek v. Pittenger*, 421 U.S. 349 (1975). The remark of Mr. Justice Brennan, partially dissenting in that case, is relevant. "[I]t should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones." *Id.* at 381. Except insofar as it provides narrowly defined health services, this law must be declared invalid.

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For the foregoing reasons, appellants respectfully urge this Court to reverse the decision of the District Court.

Respectfully submitted,

JOSHUA J. KANCELBAUM  
2121 The Illuminating Building  
Cleveland, Ohio 44113  
(216) 781-5245

NELSON G. KARL  
American Civil Liberties Union  
of Ohio Foundation, Inc.  
203 East Broad Street  
Columbus, Ohio 43215  
(614) 228-8951

DONALD M. ROBINER  
1700 Investment Plaza  
Cleveland, Ohio 44114  
(216) 696-4666

JOEL M. GORA  
American Civil Liberties Union  
22 East 40th Street  
New York, New York 10016  
(212) 725-1222

*Attorneys for Appellants*

## APPENDIX

## **APPENDIX**

### **OHIO REVISED CODE**

#### **Section 3317.06 (SB 170):**

Moneys paid to school districts under division (P) of section 3317.024 [3317.02.4] of the Revised Code shall be used for the following independent and fully severable purposes:

(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

(B) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and non-ideological instructional materials as are in use in the public schools within the district and which are incapa-

ble of diversion to religious use and to hire clerical personnel to administer such lending program.

(C) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and non-ideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

(E) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service.

(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service.

(G) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall

be provided by the public school district in which the nonpublic school is located.

(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state.

(K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the

public school, or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(L) To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable.

Health services provided pursuant to divisions (D), (E), (F), and (G) of this section may be provided under contract with the state department of public health.

Transportation of pupils provided pursuant to divisions (G), (H), (I), and (K) of this section shall be provided by the public school district from its general funds and not from moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code.

The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory of instructional materials and instructional equipment, distribution of instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional materials and instructional equipment, and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their

services upon the premises of the nonpublic school when in the determination of the state department of education, it is necessary and appropriate for efficient implementation of the lending program.

No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district.

Health and remedial services and instructional materials and equipment provided for the benefit of nonpublic school pupils pursuant to this section and the admission of pupils to such nonpublic schools shall be provided without distinction as to race, creed, color, or national origin of such pupils or of their teachers. No instructional materials or instructional equipment shall be loaned to pupils in nonpublic schools or their parents unless similar instructional materials or instructional equipment are available for pupils in the public schools of the school district.

No school district shall provide services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity.

As used in this section, "parent" includes a person standing in loco parentis to a child.

Notwithstanding section 3317.01 of the Revised Code, payments shall be made under this section to any city, local, or exempted village school district within which is located one or more nonpublic elementary or high schools.

The allocation of payments for textbooks, instructional materials, instructional equipment, health ser-

vices, and remedial services to city, local, and exempted village school districts shall be on the basis of the state board of education's estimated annual average daily membership in nonpublic elementary and high schools located in the district.

Payments made to city, local, and exempted village school districts under this section shall be equal to specific appropriations made for the purpose.

The state department of education may adopt guidelines and procedures under which such programs and services shall be provided and under which districts shall be reimbursed for administrative costs incurred in providing such programs and services.

Funds distributed pursuant to this section shall not exceed specific appropriations made therefor by the general assembly, unless expressly approved by the emergency board or the controlling board.

**Former Section 3317.062 (repealed):**

Moneys paid to school districts under division (D) of section 3317.02 of the Revised Code shall be used to provide . . . services and materials to pupils attending nonpublic schools within the school district for: guidance, testing, and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children; audio-visual aids; speech and hearing services; remedial reading programs; educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils. . . .

. . . . .

Services, instructional materials, or programs provided pursuant to this division for pupils attending nonpublic schools shall not exceed in cost or quality such services, instructional materials, and programs as provided for pupils in the public schools of the district.

No school district shall provide services, materials, or programs for use in sectarian religious courses or devotional exercises. No educational materials provided shall be used in, especially suitable for use in, or selected for use in sectarian religious courses or devotional exercises.

Educational services, materials, and programs provided for the benefit of nonpublic school pupils under this division and the admission of pupils to such nonpublic schools shall be provided without distinction as to the race, creed, color, or national origin of such pupils or of their teachers. No services, materials, or programs shall be provided for pupils in nonpublic schools unless such services, materials, or programs

are available for pupils in the public schools of the school district.

The state department of education shall adopt guidelines and procedures under which such programs and services shall be provided and under which districts shall be reimbursed for administrative costs incurred in providing such grants, services, and materials.

Funds distributed pursuant to this section shall not exceed specific appropriations made therefor by the general assembly, unless expressly approved by the emergency board or the controlling board.

**Section 3317.024:**

To school districts meeting the requirements of section 3317.01 of the Revised Code, in addition to the moneys paid to eligible school districts pursuant to section 3317.022 [3317.02.2] or 3317.11 of the Revised Code, there shall be distributed monthly, quarterly, or annually as may be determined by the state board of education, moneys appropriated for the following education programs:

. . . . .

(P) An amount to each school district, for each pupil attending a chartered nonpublic elementary or high school within the district. The amount shall equal the amount appropriated for the implementation of section 3317.06 of the Revised Code divided by the average daily membership in grades one to twelve in nonpublic elementary and high schools within the state as determined during the first full week in October of each school year.